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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM MORRIS HALL,

Defendant and Appellant.

D053791

(Super. Ct. No. SCN237803)

APPEAL from a judgment of the Superior Court of San Diego County, Joel M. Pressman, Judge. Affirmed.

A jury convicted William Morris Hall of six counts of making false bomb threats. (Pen. Code,<sup>1</sup> § 148.1, subd. (c).) Hall appeals, contending admission of recorded voice lineups which identified his voice as the bomb threat caller was improper. Hall argues the lineups were unduly suggestive and infringed upon his Sixth Amendment right to counsel because his counsel was not present when the lineups were conducted. Hall

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

concedes his trial counsel did not object to the lineups on Sixth Amendment grounds, but argues his counsel's failure to raise the issue gives rise to a claim of ineffective assistance of counsel.

We conclude the voice identifications were not unduly suggestive and did not violate his Sixth Amendment right to counsel. We therefore affirm the judgment.

### FACTUAL AND PROCEDURAL BACKGROUND

On September 13, 2007, at about 9:51 a.m., a male caller told Palomar Community College (PCC) switchboard operators Thomas Sanchez and Gloria Hilstad, "There was a bomb in the cafeteria" and hung up immediately. Campus police evacuated the cafeteria and areas in the immediate vicinity of the cafeteria for about three hours but found no bomb.

On September 19, 2007, between 7:52 a.m. and 10:48 a.m., the same caller made four additional bomb threat calls to PCC. At about 7:52 a.m., the caller told campus police dispatcher Lori Polentz, "Someone put a pipe bomb near the Gym; you might wanna to get people out of there. Oh, my God!" and hung up immediately. Campus police evacuated the buildings in the immediate vicinity of gym. At about 9:04 a.m., the caller told Sanchez: "You are looking at the wrong building; it's the next building over. The next bell that rings, we will die."

At about 9:25 a.m., the caller told Sanchez, Hilstad, and campus police officer Monika Forest: "You have one hour to find the bomb or 100 students will die." At about 10:48 a.m., the caller told Polentz: "Lori, the kids in the Child Care Center are about to be blown up." When Polentz asked the caller's location, he said: "Fuck you bitch.

You're about to find out." The police evacuated the child care center and closed it for the rest of the day. Campus police cleared other buildings after about four and a half hours and found no bomb.

On October 18, 2007, at about 9:46 a.m., Hilstad received yet another bomb threat call from the same caller. The caller said: "There is bomb in the ditch behind the cafeteria and you will be responsible." The police evacuated the cafeteria and areas in the immediate vicinity of the cafeteria for about three hours.

Although no recording device was available at PCC to record the calls, after each call, each recipient filled out a two-page bomb check list outlining facts about each call. Hilstad, Sanchez and Polentz described the caller's voice as a young African-American male based on his tone of voice and accent. They also stated they could identify the bomb threat caller's voice if they heard it again.

After campus police sergeant Lee Martin reviewed the records of incoming calls to PCC, he noticed only one phone number matched the days and times of all the bomb threats. (CT 15-16; 2 RT 445-450, 455)! Martin was able to determine Hall was the subscriber for that phone number. Hall was employed at Aramark, the PCC campus cafeteria vendor in September and October 2007. Hall was the only African-American employee at Aramark.

On November 15, 2007, under Martin's direction, community service officer Arwen Lott, equipped with a hidden recording device, engaged in a casual conversation with Hall at the cafeteria to obtain Hall's cell phone number. Martin subsequently used the recorded conversation between Hall and Lott (Recording 1) in two voice lineups.

On November 16, 2007, Polentz was played the recorded conversation between Hall and Lott (Recording 1) and recognized Hall's voice as the voice of the bomb threat caller (November lineup). Moreover, Polentz noted that the background noise in the recording could have been coming from the student union area. She also identified it as similar to the background noise in the bomb threat call on September 19, 2007.

Hall was arrested on November 20, 2007. During the course of his arrest, Hall was unusually concerned about his cell phone's whereabouts. After the police handcuffed Hall and placed him in the back of the police car, Hall kicked the rear window and made a loud bang noise. When the police asked Hall if there was a problem, Hall insisted that his cell phone be given to his neighbor. During his transportation to the jail, Hall kept asking for his cell phone and wanted to know what happened to it and where it was. When the police asked about the bomb threats, Hall denied making the calls and stated that he loans his cell phone to other people, so someone else must have used his phone.

On December 3, 2007, Martin conducted recorded voice lineups with Hilstad, Sanchez and Polentz (December lineup). Martin used two recordings and neither contained any conversation concerning the bomb threats. The first voice lineup was the recorded conversation between Hall and Lott (Recording 1). The second recording contained the voices of Hall, Martin and Forest (Recording 2). Martin conducted each lineup separately. Before the lineups, Martin admonished each witness that he or she would be listening to recordings of voices, that he or she may or may not recognize any voices and was under no obligation to identify any voices.

At the lineups, Sanchez and Polentz identified Hall's voice as the bomb threat caller. They also recognized the voices of Martin and Forest from the recordings. On the other hand, Hilstad stated she could not identify the recorded voice with certainty but believed it was similar to the bomb threat caller. Hilstad, Sanchez and Polentz knew of Hall's arrest at the time of the voice lineups.

When police examined Hall's cell phone, it was not accessible because it was locked with a password. According to the testimony of Hall's girlfriend Francesca Agate-Scott during the trial, Hall's cell phone was protected with a three-digit password.

Hall made a motion in limine to suppress evidence of the pre-trial voice identifications claiming the circumstances surrounding the voice lineups were unnecessarily suggestive. The trial court ruled that the pretrial voice identifications of Sanchez and Polentz were admissible because Sanchez and Polentz identified Hall's voice with particularity based on the characteristics of the voice. The trial court, however, reserved ruling on the admissibility of Hilstad's voice identification because she did not make a clear identification. The trial court also found that the method used in the voice lineups was neither suggestive nor exclusive and thus, the voice identification was fair.

Contrary to Hall's statement to police about loaning his cell phone to other people, at trial, Hall's friends James McCarver and Matthew Tisnado and co-workers testified they never saw Hall loan his cell phone to anyone. Tisnado testified he used Hall's cell phone once or twice to access the Internet but denied making the bomb threat calls. McCarver and Tisnado also testified they went into the woods with Hall to smoke pot during one of the evacuations after the bomb threats. Kassandra Starr, Hall's co-worker,

testified she saw Hall use his cell phone right before the bomb threat evacuation on the morning of October 18, 2007.

At trial, Sanchez was played a recording that contained a conversation between Hall and Agate-Scott (Recording 3) and identified Hall's voice as the bomb threat caller based on its particularity. When Polentz was played the same recording (Recording 3), she also identified Hall's voice as the bomb threat caller based on the characteristics of the voice. Polentz also stated Hall's voice in the recording (Recording 3) was same as the voice in the first recording between Hall and Lott (Recording 1). On the other hand, Hilstad could not clearly identify Hall's voice as a bomb threat caller from the same recording (Recording 3) although she agreed both voices had similar characteristics.

## DISCUSSION

### *A. The Voice Lineups Were Not Unnecessarily Suggestive*

Hall claims the lineups were unnecessarily suggestive and conducive to mistaken identification and therefore violated his due process rights. We find no due process violation.

A pretrial identification procedure violates a defendant's due process rights if it is so impermissibly suggestive that it creates a very substantial likelihood of irreparable misidentification. (*People v. Contreras* (1993) 17 Cal.App.4th 813, 819.) The defendant bears the burden of proving unfairness as a "demonstrable reality," not just speculation. (*Ibid.*) On review we must consider the totality of the circumstances to determine whether the identification procedure was unconstitutionally suggestive. (*Ibid.*)

In considering all the circumstances, the trial court found that Sanchez and Polentz had ample opportunity to identify the sound of the caller's voice and "clearly" recognized the particular characteristics of the voice in terms of deep pitch, accent, age and stress of the caller. Thus, the trial court found Martin's presentation of the lineups was not suggestive nor unfair in any way.

We agree with the trial court. In reviewing the reliability of the identifications here, we note that given the number of threatening calls that were made and the relatively distinctive nature of what the caller said, the witnesses had ample opportunity to remember and later identify the caller's voice. Importantly, immediately after each call was received, all three witnesses, Hilstad, Sanchez and Polentz, filled out a two-page bomb check list describing the call and the caller. At the time of the calls, each witness consistently described the caller's voice as young African-American male based on his tone of voice and accent. During the pretrial voice lineups, Sanchez and Polentz identified Hall's voice based on certain characteristics of the voice in the recordings, such as tone, pitch, age and accent, which were consistent with their earlier descriptions. Given all these circumstances, like the trial court, we must reject Hall's contention that the voice lineups were suggestive or unfair.

Hall nonetheless contends that the lineups were conducted after an inordinate delay and therefore the identifications could not have been based on recent memories of the perpetrator of the crime. To support his contention, Hall cites *People v. Bisogni* where a visual showup was conducted nearly six months after the crime. (*People v. Bisogni* (1971) 4 Cal.3d 582, 587.) *Bisogni* is clearly distinguishable. Here, the lineups

were conducted on November 16, 2007, and December 3, 2007, and both were less than two months after the last bomb threat.

In short, we do not see any unfairness, certainly none offending constitutional standards, in the court's decision to allow the identification evidence. Thus, we find no error.

In any event, any error in admitting the voice identification evidence would have been harmless because other overwhelming evidence supports Hall's conviction as the bomb threat caller.

The applicable test for determining whether an error which violates federal constitutional principles is reversible error was set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. (*Ibid.*) This determination "must be based on our own reading of the record and on what seems to us to have been the probable impact of the . . . [errors] on the minds of an average jury." (*Harrington v. California* (1969) 395 U.S. 250, 254 [89 S.Ct. 1726].)

Here, the record clearly presents the case against Hall even without the evidence of the pretrial voice identifications. The telephone records admitted into evidence show that Hall's cell phone number was the only number which matched the days and times of all the bomb threats. During the arrest, Hall was overly concerned about giving his cell phone to his neighbor rather than having it with him to the police station. McCarver and Tisnado, two of Hall's friends, testified that they never saw Hall loan his cell phone to anyone else. We also note Hall's cell phone was locked with a password. The fact that



McCarver, Tisnado and Hall went to smoke pot during one of the evacuations suggests Hall's probable motivation to make bomb threat calls. Finally, Starr, Hall's co-worker, further testified she saw Hall using his cell phone right before the bomb threat evacuation on October 18, 2007.

Given this record, the admission of the pretrial voice identifications by Sanchez and Polentz could not conceivably prejudice Hall and was harmless beyond a reasonable doubt.

*B. The Sixth Amendment Right Was Not Violated At the Recorded Voice Lineups*

Generally, questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal. (See Evid. Code, § 353; *People v. Welch* (1972) 8 Cal.3d 106, 114-115.)

During the trial, Hall objected to the admission of the recorded voice identification based on due process grounds but not on his Sixth Amendment right to counsel. Because Hall failed at trial to object on Sixth Amendment grounds, his right to appeal on that issue was forfeited. (See *People v. Welch, supra*, 8 Cal.3d at pp. 114-115.) However, Hall claims his Sixth Amendment challenge, insofar as it shows his trial counsel failed to timely raise it, is preserved because his trial counsel's failure was ineffective assistance of counsel. As we explain, we reject Hall's Sixth Amendment argument on the merits.

The right to adequate assistance of counsel is in addition to the general due process protection of a fair trial; it focuses " 'on the quality of the representation provided

the accused.' " (*People v. Nation* (1980) 26 Cal.3d 169, 178.) To determine whether a defendant has been denied adequate assistance of counsel, the appellant has the burden of showing that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates. (*Ibid.*) In addition, appellant must establish that counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense. (*Ibid.*) In sum, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. (*People v. Scott* (1997) 15 Cal.4th 1188, 1211.) We conclude Hall did not meet his burden because there is no Sixth Amendment right to counsel during a recorded voice lineup.

A defendant is entitled to the assistance of counsel not only at the trial itself, but at all "critical stages" of his "prosecution." (*United States v. Ash* (1973) 413 U.S. 300, 321 [93 S.Ct. 2568] (conc. opn. of Stewart, J.)) A pretrial lineup is such a critical stage because the risk of unfair suggestive influence at a lineup could seldom be reconstructed at trial and it jeopardizes the accused's right to a fair trial. (See *United States v. Wade* (1967) 388 U.S. 218, 237 [87 S.Ct. 1926].) Also, the assistance of counsel is required where a [pretrial] lineup constitutes a trial-like confrontation in order to preserve the adversary process by compensating for advantages of the prosecuting authorities. (*United States v. Ash, supra*, 413 U.S. at p. 314.) In other words, where the similarity to

trial is apparent, counsel is needed to render "assistance" in counterbalancing any "overreaching" by the prosecution. (*Ibid.*)

However, a pretrial photographic display is not a "critical stage" of the prosecution. (*United States v. Ash, supra*, 413 U.S. at p. 325 (conc. opn. of Stewart, J.).) Where the defendant is not present at the time of the photographic display, he or she does not require aid from his or her counsel because there is no possibility that the defendant might be misled by his or her lack of familiarity with the law or overpowered by his or her professional adversary. (See *id.* at p. 321.)

A recorded voice lineup is analogous to a photographic lineup. (See *People v. Reese* (1981) 121 Cal.App.3d 606, 613.) Although the court held that the right to counsel at a live voice lineup is the same as at a live visual lineup, it clearly distinguished a recorded voice lineup from a live voice lineup. (*Ibid.*) The court pointed out that, while a live voice lineup cannot similarly be reproduced if the other voices are unavailable for the jury to hear, a recorded voice lineup or a photo lineup could be reproduced in court, so the trier of fact could determine its suggestiveness. (*Ibid.*)

Because Hall was not present at the recorded voice lineups and because the recorded voice lineups could be reproduced in court for the jury to hear, those lineups constituted neither a trial-like confrontation nor a critical stage of prosecution. Therefore, Hall was not entitled to the Sixth Amendment right to counsel during the pretrial recorded voice lineups.

Accordingly, Hall's ineffective assistance of counsel claim is futile because his Sixth Amendment right to counsel claim would have been unsuccessful in any event.

Thus, Hall failed to show both the deficient performance by his trial counsel and resulting prejudice.

DISPOSITION

The judgment is affirmed.

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BENKE, Acting P. J.

WE CONCUR:

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HALLER, J.

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McINTYRE, J.